National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: June 12, 1998

TO: William A. Pascarell, Regional Director, Region 22

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Control Systems, Case 22-CA-22547

518-4040-8333, 530-4080-5000, 530-4080-5006, 530-4080-5006-5000, 530-4080-5012, 530-4080-5012-8300

This case was submitted for advice as to whether the Employer violated Sections 8(a)(2) and (5) by withdrawing recognition from the incumbent Union and recognizing its rival upon the rival's presentation of authorization cards signed by a majority of the unit.

FACTS

On December 16, 1996, the International Union of Industrial, Services, Transport & Health Employees, District 6 (the Union) was certified as the exclusive representative of a unit of cleaning personnel employed by Control Systems (the Employer). The parties bargained in good faith during 1997, but did not reach an agreement. On approximately January 12, 1998 the Employer received a demand for recognition accompanied by cards, signed by a majority of the unit, designating SEIU Local 1212 (Local 1212) as their bargaining representative. The cards were counted by an impartial arbitrator, who confirmed that a majority of the unit had so designated Local 1212. The Employer recognized Local 1212 and withdrew recognition from the Union, based on its asserted good faith doubt of the Union's continuing majority status. No representation petition was on file at the time of recognition. There is no evidence that the Employer engaged in bad faith bargaining during negotiations or engaged in other unfair labor practices.

ACTION

We conclude that the Section 8(a)(2) and (5) charge should be dismissed, absent withdrawal.

It is well settled that a Section 9(a) representative enjoys a rebuttable presumption of majority status after the certification year expires.[(1)] An employer may rebut the presumption by showing either that the union no longer enjoys majority status or that the employer has a good-faith and reasonably grounded doubt of the union's continued majority status.[(2)] This doubt must be based on objective considerations and raised in a context free of employer unfair labor practices aimed at causing employee disaffection.[(3)]

In Louisiana Dock Co.,[(4)] 8 strikers in a 16 employee unit informed the employer of their desire to be represented by a rival union. The employer's withdrawal of recognition from the incumbent was held to be lawful, since the eight employees' support for the rival demonstrated that a majority did not support the incumbent and the employer therefore had an objective and reasonable basis for doubting the union's majority status.[(5)]

RCA Del Caribe[(6)] is not to the contrary. There, the Board reexamined its requirements of employer neutrality, set forth in Midwest Piping and Supply Co.,[(7)] where the incumbent union is challenged by a rival union. The Board held that the mere filing of a representation petition by an outside, challenging union will no longer permit an employer to withdraw from bargaining or from executing a contract with an incumbent union. However, the Board expressly stated that this rule would not preclude an employer from withdrawing recognition in good faith based on objective evidence of a loss of majority status.[(8)]

Here, Local 1212 presented the Employer with cards signed by a majority of the unit designating the rival union as their bargaining representative. Absent evidence supporting the incumbent, the Employer, like the employer in Louisiana Dock Co., had a reasonable good-faith doubt concerning the Union's continued majority status. Thus, the Employer's withdrawal of recognition did not violate Section 8(a)(5).

In Chelsea Industries,[(9)] the General Counsel, in arguing to the Board that the employer was not privileged to withdraw recognition from the union, made an alternative argument that the Celanese "good faith" doubt standard should be overturned. The General Counsel argued that the Celanese rule encourages employers to engage in self-help measures which undermine the Supreme Court's view that, "even after the certification year has passed, the better practice is for an employer with doubts to keep bargaining and petition the Board for a new election or other relief."[(10)] Thus, the General Counsel argued that a secret-ballot election should be the only means by which a Section 9(a) representative's presumption of majority status can be rebutted. However, it is not appropriate in this case to issue complaint solely on the General Counsel's alternate theory in Chelsea Industries. The Board currently permits an employer to withdraw recognition based on an objective good faith doubt of majority status, and there is no argument supporting a violation under current Board law. Furthermore, retroactive application of any new rule announced in Chelsea would be uncertain.

We further conclude that the Employer did not violate Section 8(a)(2) by recognizing Local 1212. Since it was lawful to withdraw recognition from the Union, the Employer was free to recognize Local 1212 on a showing of a card majority, where no petition had been filed.[(11)]

For the foregoing reasons, the Section 8(a)(2) and (5) charge should be dismissed, absent withdrawal.

B.J.K.

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[1] Master Slack Corp., 271 NLRB 78, 84 (1984).

[2] Id. Celanese Corp. of America, 95 NLRB 664, 671-73 (1951).

[3] See Hearst Corp., 281 NLRB 764 (1986); Manhattan Hospital, 280 NLRB 113 (1986), enfd. mem. 814 F.2d 653 (2d Cir. 1987), cert. denied 483 U.S. 1021 (1987).

[4] 297 NLRB 439, 441 (1989).

[5] See also Katz's Deli, 316 NLRB 318, 332 (1995), enfd. 151 LRRM 3013 (2d Cir. 1996) (but for the fact that the employer was aware of a recent majority petition supporting the incumbent, it would have had a reasonable good faith doubt of majority status based on the signing of authorization cards for the rival union by a majority of the unit); Mitchell Drywall & Plastering, Case 17-CA-17341, Advice Memorandum dated July 6, 1994 (cards signed by 50% of the unit for rival union sufficient to establish good-faith doubt); NLRB v. Koenig Iron Works, 110 LRRM 2995, 3002 (2d Cir. 1982) (in dicta, the court noted that signed representation cards for a rival union is the type of evidence necessary to establish good-faith doubt).

[6] 262 NLRB 963 (1982).

[7] 63 NLRB 1060 (1945).

[8] 262 NLRB at 965 n.13.

[9] Cases 7-CA-36846 et al.

[10] Brooks v. NLRB, 348 U.S. 96, 104 n.18 (1954). See also Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 50 n.16 (1987) (allowing employers to rely on employees' rights in refusing to bargain is inimical to industrial peace) (dictum).

[11] Compare Louisiana Dock Co., 297 NLRB at 440 (employer lawfully withdrew recognition from incumbent union based on good faith doubt, but violated Section 8(a)(2) by recognizing the rival union while a petition was pending, citing Bruckner Nursing Home, 262 NLRB 955 (1982)). See also Signal Transformer Co., 265 NLRB 272, 274 (1982).